

24

DOC NO
RECD/FILED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NEIL GAIMAN, and
MARVELS AND MIRACLES, LLC,

J.W. SCHWARTZ
CLERK US DIST COURT
WI CI WA

Plaintiffs,

v.

Case No.: 02-C-0048-S

TODD MCFARLANE,
TODD MCFARLANE PRODUCTIONS,
INC., TMP INTERNATIONAL, INC.,
MCFARLANE WORLDWIDE, INC., and
IMAGE COMICS, INC.,

Defendants.

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE
TO FILE AN AMENDED COMPLAINT PURSUANT TO RULE 15**

TO: R. Scott Feldmann, Esq.
Brobeck, Phleger & Harrison, LLP
38 Technology Drive
Irvine, CA 92618-5312

Todd G. Smith, Esq.
LaFollette, Godfrey & Kahn
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719

Michael Kahn, Esq.
Stinson, Mag & Fizzell
100 S. 4th Street, Suite 700
St. Louis, MO 63102

PLEASE TAKE NOTICE that plaintiffs Neil Gaiman and Marvels and Miracles, LLC, hereby move the Court, pursuant to Fed. R. Civ. P. 15, for leave to file an amended complaint to conform plaintiffs' pleading to the evidence. The grounds for this motion are set forth below and in the Declaration of Neil Gaiman ("Gaiman Decl."), Affidavit of Brenda Allen-Johnson ("Johnson Aff."), and Affidavit of Jeffrey A. Simmons filed on April 4, 2002.

1. Attached as Exhibit A to this motion is plaintiffs' proposed Amended Complaint.
2. The Amended Complaint would withdraw plaintiffs' claim against all defendants for Derogation of Moral Rights and withdraw, only with respect to defendant Image Comics, Inc. ("Image"), plaintiffs' claims for breach of contract, promissory estoppel, and fraud.
3. The Amended Complaint would also add two new claims against all defendants for misappropriation of plaintiff Neil Gaiman's ("Gaiman") name and identity pursuant to Wisconsin common law and violation of his right of privacy pursuant to Wis. Stat. § 895.50.
4. Finally, the Amended Complaint would change Gaiman's claim against defendant Todd McFarlane ("McFarlane") for copyright infringement to a claim against McFarlane for declaratory judgment of copyright ownership and an accounting of income and profits.
5. Federal R. Civ. P. 15(a) provides that leave to file an amended pleading "shall be freely given when justice so requires." Moreover, Rule 15(b) provides that a party may seek leave to amend its pleadings to conform to the evidence at any time during the proceedings.
6. Plaintiffs' Amended Complaint is necessary to conform plaintiffs' pleading to recently discovered evidence. As set forth in the Gaiman Affidavit, Gaiman discovered just last week that defendants are currently reprinting a collection of comics Gaiman authored under the name "Angela's Hunt." (Gaiman Aff. ¶ 4.) Defendants are promoting that publication by making extensive use of Gaiman's name and biographical information. (*Id.*) Yet defendants are not paying Gaiman for their republication of his work or their use of his name and biographical information. (*Id.*) Nor did Gaiman ever give defendants written consent to use any of that information. (*Id.*) Because of Gaiman's fame as an author, his name and biographical information have promotional value, as evidenced by the fact that Gaiman is often paid for his public appearances. (Gaiman Aff. ¶ 3.)

7. This recently discovered evidence is an appropriate basis for claims under Wisconsin's right to privacy law, Wis. Stat. 895.50 and common law misappropriation. See Wis. Stat. 895.50; Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 397, 280 N.W.2d 129, 137 (1979).

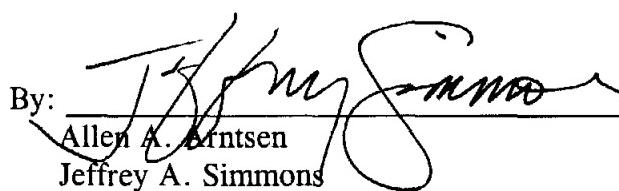
8. Similarly, plaintiffs' request to reframe Gaiman's claim against McFarlane for copyright infringement as a claim for declaratory judgment and an accounting, merely conforms the pleadings to the evidence known to date. Gaiman authored scripts, treatments, and sketches for the comic books at issue, while defendant McFarlane provided artwork. The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. The proper remedy between authors of a joint work is an accounting. See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994).

9. Permitting plaintiffs' requested amendments to the complaint will not prejudice the defendants or delay these proceedings. This action was filed on January 24, 2002 and none of the defendants have begun to conduct discovery. Nor is this amendment merely an effort to circumvent Image's pending motion to dismiss. (Affidavit of Jeffrey A. Simmons ¶ 5.) As set forth in plaintiffs' brief in response to Image's motion, that motion fails regardless of plaintiffs' amendments.

10. For the reasons set forth above, plaintiffs request that the Court grant this motion for leave to file an amended complaint. See Eades v. Thompson, 823 F.2d 1055, 1062-63 (7th Cir. 1987) (district court should have permitted third amendment to complaint where plaintiff presented new evidence that strengthened his claim).

Dated this 5 day of April, 2002.

By:


Allen A. Brantsen
Jeffrey A. Simmons

Attorneys for Plaintiffs
Neil Gaiman and Marvels and Miracles, LLC

Of Counsel:

Mark Hellmann
Michael Rechtin
FOLEY & LARDNER
1 IBM Plaza
220 N. Wabash Suite 3300
Chicago, IL 60611
Tel: (312) 755-1900
Fax: (312) 755-1925

Address:

FOLEY & LARDNER
150 East Gilman Street
Madison, WI 53703
Tel: (608) 257-5035
Fax: (608) 258-4258

Kenneth F. Levin
Kenneth F. Levin and Associates
20 North Wacker Drive, Suite 2200
Chicago, IL 60606
Tel: (312) 984-6000
Fax: (312) 977-2990
email: KFL@2200.com